SUMMARY OF SIGNIFCANT ARBITRATION CASES FOR 2003

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Boghos v. Lloyds of London, 109 Cal. App. 4th 1728 (2003). Ambiguous Provision Construed Against Contract Drafter-Unconscionability. The insurance contract in this case contained two apparently contradictory clauses. One clause, entitled the "Service of Suit Clause" provided that Lloyds would submit to the jurisdiction of a court of competent jurisdiction within the United States in the event of failure to pay any amount claimed to be due under the insurance policy. Another clause, entitled "Binding Arbitration" provided that "any dispute which arises shall be settled in Binding Arbitration." Lloyds claimed that the Service of Suit Clause only pertained to suits seeking the confirmation of an arbitration award. But the court rejected that argument on several grounds. First, there was nothing in the clause which limited its applicability to the enforcement of arbitration awards. Second, Lloyds' interpretation would render the clause as surplusage because the California Arbitration Act gives parties an independent right to petition courts for enforcement of arbitration awards. See Code of Civil Procedure Section 1285. Third, if the service of suit clause is construed to apply only to the confirmation of arbitration awards based upon claims for failure to pay, then the clause would prohibit confirmation actions of any other type of claim asserted and would be in contravention of California and federal law. But, most importantly, Lloyds' position conflicted with the rule that ambiguities in contracts, particularly adhesive contracts, be resolved against the drafter. In addition, the arbitration clause was unconscionable because it allowed Lloyds, but not the insured, to opt out of arbitration and it also required the parties to split the costs of the arbitration, even if the insured prevailed.

Equal Employment Opportunity Commission v. Luce Forward Hamilton & Scripps, 341 F. 3d 742 (9th Cir. 2003). Validity of Mandatory Predispute Arbitration Agreements with Employees-Right to Terminate Employees Whod Decline to Sign the Agreement. Employers may mandate employees to sign predispute arbitration agreements which, inter alia, require the employee to arbitrate disputes involving federal and state antidiscrimination statutes as well as any other statutory right granted to the employee. By agreeing to arbitrate a statutory claim, the employee does not forego the substantive rights afforded by the statute; the employee only submits to resolution of the dispute in an arbitral, rather than a judicial forum.
Furthermore, if the employee refuses to sign the agreement and is then terminated, the employer does not engage in retaliatory conduct that is prohibited by the federal and state antidiscrimination statutes. An employer can be charged with retaliation if the employee has opposed "any practice made an unlawful employment practice" or if the employee has a reasonable belief that the practice is unlawful. In this case, the employee could not have had a reasonable belief that the requirement that he sign an arbitration agreement was unlawful in light of various case precedents.

Comment. Arbitration provisions in employment contracts cannot include unconscionable terms. Thus, if an employee is terminated for refusing to sign an

arbitration agreement which contains unconscionable terms, it is possible that the employer could be charged with retaliation.

Green Tree Financial Corp. v. Bazzle, ____US___, 123 S.Ct. 2402, 156 L.Ed. 2d 414, 2003 US LEXIS 4798 (2003). Class Actions Permitted-Agreement Silent on Issue. Customers of Green Tree filed a class action proceeding against Green Tree in the South Carolina state court. Green Tree moved to stay the court proceeding and compel arbitration. The court certified the class action and granted the motion to compel arbitration. The arbitrator awarded damages to the class. Green Tree appealed, arguing that the agreement prohibited classwide arbitration. The South Carolina Supreme Court affirmed, holding that since the agreement was silent on the issue, class arbitration was not prohibited. The agreement provided for the appointment for a single arbitrator "selected by us (Green Tree) with consent of you (the customer)". Green Tree argued that this meant that the agreement contemplated that arbitrations were only to involve Green Tree and the named customer and not other customers who may have had similar claims against it. The Supreme Court reversed. It found the agreement to be ambiguous and held that since the parties had agreed to submit to the arbitrator "all disputes…..arising from or relating to this contract or the relationships which result from this contract", then the arbitrator, and not the court, should determine whether the agreement permitted class actions.

Comment. If the agreement specifically barred the customers from filing class actions, then it would not have passed muster in the Ninth Circuit and the California Court of Appeal. Those courts have found provisions in consumer contracts that bar class actions to be unconscionable and hence unenforceable. See *Szetela v. Discover Bank,* 97 Cal. App. 4th 1094 (2002), cert. den. 537 US 1226 (2003); *AT&T, Inc. v. Ting,* 319 F. 3d 1126 (9th Cir 2002), cert. den. 2003 US LEXIS 5506 (2003). However, in *Discover Bank v. Superior Court,* 105 Cal. App. 4th 326 (2003), the court reached a different conclusion, holding that Section 2 of the Federal Arbitration Act preempted the state laws on unconscionability. The Supreme Court of California granted review of that decision and so it has been depublished.

Gutierrez v. Autowest, Inc., 114 Cal. App. 4th 77 (2003)-Unconscionability-Fee Splitting Clause in Consumer Contract. This case involved a dispute arising from the purchase of an automobile. The contract that the parties signed contained an arbitration clause which required arbitration pursuant to the rules of the American Arbitration Association. Under the Association's fee schedule, plaintiff would have been required to pay a filing fee of $8000. The agreement did grant the arbitrator discretion to shift fees to the vendor when issuing the award. Plaintiff refused to arbitrate and filed a declaration that the fees exceeded his ability to pay. The court found the fee clause to be unconscionable, notwithstanding the arbitrator's ability to shift the fee, because the fee schedule nevertheless would deter a complainant from initiating the process. In addition, the court noted that the Association, unlike the court system, had no effective procedure for a consumer to obtain a fee waiver or reduction. The Association rules merely provided that "the AAA *may,* in the event of extreme hardship on the part of any party, *defer or reduce* the administrative fees". There was no showing of how the process was

begun, or who made the determination, or what criteria were utilized to decide if fees should be reduced or deferred. However, the court severed the fee clause, although it remanded the case to determine if the clause had been inserted in bad faith.

Comment. In *Armendariz v. Foundation Health Psychare Services, Inc.,* 24 Cal. 4th 83 (2000), the California Supreme Court categorically imposed costs unique to arbitration on employers in disputes involving statutory claims. This was a consumer, not an employment, case and the Court, in dicta, declined to adopt the *Armendariz* categorical approach in consumer cases. It held that the determination that arbitral fees in consumer cases are unreasonable should be made on a case by case basis, with the consumer carrying the burden of proof. This decision was rooted in the conclusion that jobseekers are more likely to faced "particularly acute" economic pressure to sign an employment contract with a predispute arbitration provision because few employees are in a position to refuse a job because of an arbitration requirement. A consumer seeking a new vehicle faces significantly less economic pressure.

Ingle v. Circuit City Stores, Inc., 328 F. 3d 1165 (9th Cir. 2003)-Employment Agreements-Procedural and Substantive Unconscionability. An arbitration clause in an employment agreement was found to be both procedurally and substantively unconscionable. The employer argued that the agreement was not procedurally unconscionable because the employee had three days to opt out of the agreement. But the court held that a three day waiting period was not enough to give the employee a meaningful opportunity to opt out. The agreement was found to be substantively unconscionable for a variety of reasons. First, the claims that were subject to arbitration were the claims that an employee was more likely to bring, hence the arbitration clause was one sided. Second, all claims had to be filed within one year even if the statute of limitations for a particular cause of action was longer. Third, the agreement prohibited class actions. Since it was not likely that Circuit City would file a class action against its employees, the Court found that Circuit City was insulating itself from class proceedings while conferring no corresponding benefit to its employees in return. Fourth, the agreement required the employee to pay a $75 "filing fee" to the employer. The court found that the requirement that employees to pay a fee to the very entity against which they sought redress was in and of itself a deterrent to employees who believed that they had been injured by the employer's actions. In addition, the provision made no allowance for indigent plaintiffs, unlike the court system. Fifth, the agreement required the parties to split the cost of the proceeding, even if the employee prevailed, but the arbitrator was given discretion to charge the employee with all of the costs if the employer prevailed. Sixth, the agreement limited the remedies that the arbitrator could grant to the employee. Seventh, the employer had the right to unilaterally terminate or amend the agreement, but no such right was given to the employee. Because the unconscionable provisions were so pervasive, the court refused to sever them and denied enforcement of the entire contract. See also **Circuit City Stores, Inc. v. Mantor, 335 F. 3d 1101 (9th Cir. 2003).**

Comment. In *Circuit City Stores, Inc. v. Najd,* 294 F. 3d 1104 (9th Cir. 2002) and *Circuit City Stores, Inc. v. Ahmed,* 283 F. 3d 1198 (9th Cir. 2002), both reported in last year's update, an agreement used by this same employer was found not to be

procedurally unconscionable because the employee had thirty days to opt out, was given a handbook explaining arbitration, and was encouraged to seek legal advice. Since denial of enforcement of a contract requires both procedural and substantive unconscionability, had the contract in this case contained the same waiting provision as in *Najd* and *Ahmed*, it would have been enforced, even with the substantively unconscionable provisions.

Jaramillo v. JH Real Estate Partners Inc., 111 Cal App 4th 394 (2003)-Unconscionability-An arbitration clause in a real estate lease was found to be unconscionable because it provided that the demand for arbitration had to be made within 180 days after the claim arose and all administrative fees and costs had to be advanced prior to the arbitration. There was no opportunity in the printed lease form for the tenants to decline the provision, such as by not initialing it.

Kyocera Corp. v. Prudential-Bache Trading Services, Inc., 341 F. 3d 987 (9th Cir 2003)-Provision Requiring Vacatur for Errors of Law. The arbitration agreement in this case expanded the statutory bases for vacatur by providing that the arbitrators' award could also be vacated "where the arbitrators' findings of fact are not supported by substantial evidence or where the arbitrators' conclusions of law are erroneous". Kyocera thereupon moved to vacate an award against it on the ground that the arbitrators' conclusions of law were erroneous. The District Court denied the motion, holding that the parties could not enlarge upon a federal court's power to modify an arbitration award. But the Ninth Circuit reversed and remanded, ordering the District Court to review the arbitrators' decision to determine if there were erroneous conclusions of law. *LaPine Tech. Corp. v. Kyocera Corp.,* 130 F. 3d 884 (9th Cir. 1997). The District Court again confirmed the arbitrators' decision and Kyocera appealed. This time, the Ninth Circuit overruled its previous holding and affirmed. It recognized that private parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs----including review by one or more appellate arbitration panels. But once a case reaches the federal courts, the arbitration process is complete, and because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others.

Little v. Auto-Stiegler, Inc., 29 Cal. 4th 1064, cert. den. 2003 US LEXIS 5591 (2003)-Unconscionability-Provision Allowing Appeal to Second Arbitrator but with Minimum Monetary Threshold. The arbitration clause in the employment contract in controversy provided that a party against whom an award of $50,000 or more was issued could appeal to a second arbitrator. The clause was found to be unconscionable. The court felt that the employer failed to adequately explain the reason for the $50,000 threshold. From an employee's perspective, the decision to resort to arbitral appeal wold be made not according to the amount of the arbitration award but the potential value of any arbitration claim compared to the cost of the appeal. If the employee estimated that the potential value of the claim was substantial, and the arbitrator ruled that the employee take nothing because of his erroneous understanding of a point of law, then it is rational for the employee to appeal. But he could not do so where there was a monetary threshold. Thus, the $50,000 threshold inordinately benefits employers. The purpose of the

provision was to give the arbitral defendant—normally the employer—a substantial opportunity to overturn a sizeable arbitration award.

Comment. Had the contract provided for an appeal without a threshold, it would have been enforced.

Metalclad Corporation v. Ventana Environmental Organizational Partnership, 109 Cal. App. 4th 1705 (2003)-Non Signatory to Arbitration Agreement-Parent of Party. Metalclad filed suit against Geologic, inter alia, for breach of an agreement to acquire Econsa, a subsidiary of Metalclad. It also sued Ventana, Geologic's parent, for breach of an oral agreement to provide funds to Geologic to finance the acquisition. The contract between Metalclad and Geologic contained an arbitration clause and so Ventana and Geologic moved to compel arbitration. Geologic's motion was granted but Ventana's motion was denied because it was not a signatory to the contract between Metalclad and Geologic. The Court of Appeal reversed on the ground of equitable estoppel. This doctrine will apply when a party that has signed an arbitration agreement attempts to avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants. Here, Metalclad knew that Geologic's performance was dependent on Ventana investing sufficient working capital in its subsidiary and had sought Ventana's assurance that it would do so in the oral contract. Thus, Metalclad's breach of contract claim against Ventana was "intimately founded in and intertwined with" the underlying Geologic contract. There was a similar result in **Wilmot v. McNabb, 269 F. Supp. 2d 1203 (ND Cal 2003)**, where the parent of a brokerage firm successfully compelled arbitration of a complaint filed by a customer of the subsidiary.

Wilmot v. McNabb, 269 F. Supp. 2d 1203 (ND Cal 2003)-Venue Provision Requiring Arbitration in Home Jurisdiction of Stronger Party-Severability. Defendant First Trust moved to compel arbitration of Wilmot's complaint. Plaintiffs, California residents, argued that the arbitration agreement was procedurally unconscionable because it required the hearing to be held in Denver, which is First Trust's headquarters. First Trust pointed out that the services that it provided could have been obtained elsewhere without submission to an arbitration agreement that provided for a Denver venue. But the court finds that under California law the availability of alternative sources for the subject service is insufficient to defeat a claim of procedural unconscionability. The provision is also substantially unconscionable because First Trust does business throughout the United States but requires individual customers from across the country to travel to one locale---its home jurisdiction---to arbitrate their claims. However, the court severs the unconscionable clause, even though the contract does not contain a severability provision, and orders arbitration because the venue provision stands alone and does not permeate the contract.

Wolschlager v. Fidelity National Title Insurance Co., 111 Cal. App. 4th 784 (2003)-Arbitration Agreement in Separate Document. Plaintiff filed suit against a title insurance company based on an error in the preliminary title report. The preliminary report, the only document actually executed by the parties, did not contain an arbitration

clause, but the title insurance company was able to compel arbitration based on an arbitration clause in the title policy on the theory that the title policy was incorporated into the preliminary report. For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties. The title policy met all of these requirements. There is no authority requiring the defendant to specify that the incorporated document contains an arbitration clause in order to make the incorporation valid. All that is required is that the incorporation be clear and unequivocal and that the plaintiff can easily locate the incorporated document.